Mailed 4/24/00

IN THE MATTER OF:		
Alma A. Bolton Claimant		Case No. 1999-LHC-1524
against		OWCP No. 7-149876
Halter Marine, Inc. Employer		
and		
Reliance National Indemnity Co. Carrier		

APPEARANCES:

Billy Wright Hilleren, Esq.
For the Claimant

Collins C. Rossi, Esq.
For the Employer/Carrier

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on November 3, 1999 in Gulfport, Mississippi, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and EX for an exhibit offered by the Employer/Carrier. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
EX 26A	Attorney Rossi's letter filing a motion to admit post-hearing the deposition of Adrienne M. Kern (the motion was granted at the hearing)	11/05/99
CX 22	Attorney Hilleren's letter filing the	12/22/99
CX 23	Affidavit of Alma Bolton, dated 12/16/99	12/22/99
EX 27	Attorney Rossi's letter filing evidence which had been admitted at the hearing (**i.e.,** EX 20, EX 21 EX 22, EX 23, EX 24, EX 25, as well as the	12/27/99
EX 16	November 22, 1999 Deposition Testimony of Adrienne M. Kern, a document provisionally identified at the hearing, as well as the	12/27/99
EX 26	Respondents' Form LS-207, dated September 15, 1999 and an undated LS-206	12/27/99
EX 26B	Attorney Rossi's letter filing Respondents' **Motion To Reopen Record**	01/21/00
CX 24	**Claimant's Memorandum In Opposition To The Employer/Carrier's Motion to Reopen Record**	01/26/00
EX 26C	Attorney Rossi's letter filing	02/02/00
EX 26D	**Motion To Extend Deadline To File Post-Hearing Brief**	02/18/00
EX 26E	**Supplemental Memorandum In Support of Motion to Extend Record**	02/02/00
ALJ EX 17	This Court's **ORDER granting the** motions	02/02/00
CX 25	Attorney Hilleren's letter of Attorney Rossi	02/17/00
EX 26F	Attorney Rossi's **Motion To Extend**	02/18/00

	Deadline To Admit Evidence	
ALJ EX 18	This Court's **ORDER** granting the motion	02/18/00
EX 27B	Attorney Rossi's letter filing the	02/27/00
EX 27	November 29, 1999 Progress Report of M. Kern, MHS, CRC, LRC #568, as well as the supplemental reports dated February 7, 2000, February 18, 2000 and February 25, 2000, as well as the February 8, 2000 letter from Pat Gilliam of Unique Fashions	02/29/00
CX 26	Claimant's brief	03/24/00
EX 28	Employer/Carrier's brief	03/27/00

The record was closed on March 27, 2000, as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On July 14, 1998, Claimant suffered an injury in the course and scope of her employment.

4. Claimant gave the Employer notice of the injury in a timely fashion.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference by telephone on January 13, 1999.

7. The applicable average weekly wage is in dispute.

8. The Employer voluntarily and without an award has paid temporary total compensation from October 22, 1998 through September 10, 1999, at the weekly rate of $208.94 based upon her average weekly wage of $231.89. (EX 26, p. 2)

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability.

2. Claimant's average weekly wage.

3. The date of her maximum medical improvement.
4. Payment of certain unpaid medical bills.

5. Entitlement to future medical care and treatment.

6. Interest and penalties of any unpaid compensation due and owing to Claimant.

7. Respondents' entitlement to a credit for the payments received by Claimant for her 1992 and 1994 left knee injuries and her January 19, 1998 auto accident.

Summary of the Evidence

Alma A. Bolton ("Claimant" herein), thirty-three (33) years of age, with an eighth grade education and a varied employment history, began working in April of 1997 as a painter helper (CX 18) at $7.00 per hour at the Pascagoula, Mississippi shipyard of Halter Marine, Inc. ("Employer"), a maritime facility adjacent to the navigable waters of the Pascagoula River and the Gulf of Mexico where the Employer builds, repairs and overhauls ships and oil rigs. Claimant was hired by Ron Arnold and he remained her supervisor during her work for the Employer. Claimant sustained a left knee injury in 1992 while working for Ingalls Shipbuilding, another maritime employer in Pascagoula, and Claimant settled that injury in 1995, pursuant to Section 8(i) of the Act. She also injured her right knee, neck and back while working in 1994 for the Employer and she also settled that injury in 1995 (EX 12). She was treated by Dr. John W. Cope, an orthopedic physician, and he performed surgery on both knees (?). She left Ingalls in 1996 as a result of a layoff. Claimant reinjured both knees in an automobile accident on January 19, 1998 and Dr. Charlton Barnes performed surgery on that knee. (EX 25 at 3-26) She also settled that accident for "about $15,000.00" in the August of 1998. (EX 25 at 27)

Claimant was out of work for a few days after the auto accident and she then was out of work to undergo surgery on March 24, 1998 on her left knee by Dr. Barnes. Claimant returned to work on June 23, 1998 (CX 17 at 7) and she was able to perform all of her assigned duties without any restrictions. On July 14, 1998, during a rainstorm, Claimant and a co-worker were returning to their work station and, as Claimant was climbing up the wet stairs and following her co-worker, Claimant "slipped" and fell backward hitting her left knee, left wrist and left elbow on a piece of steel angle iron. According to Claimant, her altered gait because of her left knee problems has caused her feet to hurt and become numb. She reported the injury to her supervisor and she was sent

to the Employer's office where she was referred to Dr. Cooper, the Employer's physician, and he had x-rays taken on her left knee, left wrist and elbow. Dr. Cooper prescribed anti-inflammatory medication, crutches and a knee brace. She returned to work on light duty in the "foreman's office and (she) answered the phone and filed paper work;" she was able to perform this light duty work, although still experiencing "pain, but it wasn't that bad." She saw Dr. Cooper two or three times (EX 25 at 27-35, CX 17 at 10-23) and he referred her to Dr. Wiggins, an orthopedic physician, on July 21, 1998. (EX 7)

Claimant's knee symptoms have "been the same" and she experiences chronic numbness "and it hurts and it swells, and (she) can't straighten it out." Her left elbow "bothers (her) every now and then, but it (does not) bother (her) the way it used to," **i.e.**, "It used to hurt real bad. It used to get numb from (her) elbow to (her) wrist down to (her) fingers," Claimant agreeing that her wrist and elbow problems are "one injury." Sometimes her wrist and elbow "get numb" and "real cold" and "tingl(e) all the way down to (her) fingers every so often" and not as often as before. In August of 1999 she went to see Dr. Barnes for her problems and the doctor told her that he was still trying to get approval for the recommended arthroscopic surgery to her left knee and that there was no sense for her to return to see the doctor until the Respondents approve the surgery. She was not working at the time of the hearing and she last worked as a dietary aide in July of 1999 at Sunplex Subacute Center (EX 19), a nursing/rehabilitation home where her duties include, **inter alia**, "set(ting) up the trays and mak(ing) sure" that the residents receive the proper food in accordance with their diets, whether because of diabetes, cardiac or other such problems. She has looked for work elsewhere but no one will hire her. Since she left the Employer, she has also worked for Safe House Security for two to three months selling home alarm systems. She left that job because the job involved much walking and she was unable to meet "the requirements to make some money." She has worked nowhere else since leaving the Employer's shipyard. (EX 25 at 35-42)

Claimant's light duty work at the shipyard ended on October 23, 1998 because the Employer no longer had work for her and in 1999 she filed a carpal tunnel syndrome claim against her then employer, Marshall-Durbin. Dr. Fineburg is Claimant's family physician and she denied being treated for drug or alcohol problems or for any kind of mental illness. The Employer sent her to Dr. Arthur Black for a second opinion, and she also has nerve conduction studies at Dr. Millette's office. Dr. Fineburg is treating her for chest pain resulting from stress resulting from unpaid bills and "things" like that. (EX 25 at 42-50)

Claimant's medical records reflect that she went to see Dr. Kevin Cooper on the afternoon of July 14, 1998 and gave the doctor a history report that she had injured her left knee, left elbow and

left wrist when she “hit her left knee on a piece of angle iron.” Dr. Cooper found swelling on her knee, as well as “a very superficial abrasion in this area” and “lots of pain to palpation.” Dr. Cooper’s diagnosis was “multiple contusion” and left knee pain and prescribed Ketoprofen, Hydrocet and a knee brace. He released her to return to work on light duty. (CX 7 at 1) As of July 16, 1998 Claimant’s left wrist symptoms worsened enough for the doctor to diagnose also a left wrist sprain. (CX 7 at 2) Dr. Cooper’s bill is in evidence as CX 7 at 3-5.

In his November 2, 1999 letter to Respondents’ attorney, Dr. Cooper reported as follows (EX 21):

I have received your request regarding my impressions on Alma Bolton, specifically the copy of my physical examination report. (Please see attached). In addition to that report, the answers to your questions and concerns are as follows.

> Number one, Ms Bolton did advise me that she had been suffering from vertigo but stated that she was no longer suffering from vertigo at all, and that she had no dizziness whatsoever. Number two, in addition to number one, there was no further history other than the fact that she was taking multiple medications, none of which are specifically for vertigo. During the physical examination she did not demonstrate any type of vertigo, although intermittent vertigo could have been present at the time.
>
> Number three, your understanding that Ms Bolton's vertigo was no longer a problem was the inherent impression that I received from my encounter with Ms Bolton. Number four, if I had known that vertigo was a continuing problem with this patient at that time, I would not have released her to work for Halter at that time. I would have had to place her on some restrictions. Number five, those restrictions would have been no climbing, no working at heights no lifting or carrying anything weighing more than 20-30 pounds and no types of motion that would have caused her to become vertiginous.
>
> Had I known or uncovered the fact that she was still suffering from vertigo, I certainly would have placed those restrictions on her and tried to help the company accommodate her condition. It is clearly stated in my record that her vertigo is resolved and that she is being treated for depression only.

Claimant went to see Dr. Charlton H. Barnes on July 19, 1998 as the symptoms and left knee swelling persisted and the doctor ordered x-rays of the left knee and left wrist (CX 6 at 37-40) and Claimant was examined by Dr. Chris E. Wiggins and the doctor

released Claimant to return to work on light duty and imposed restrictions against climbing, prolonged walking and continued use of the knee brace. He also ordered an MRI of the left knee and the August 3, 1998 report reflects that the doctor had requested from the Employer approval for that MRI (CX 7 at 34); that test was done on August 17, 1998 and was read as normal by Dr. William R. Ehlert. (CX 6 at 15) Claimant saw Dr. Barnes on August 18, 1998 and he continued the light duty (CX 6 at 33) and requested approval for an arthrogram (CX 17 at 24). Dr. Arthur Black, also affiliated with that medical group with Dr. Barnes and Dr. Wiggins, the next day issued a disability slip releasing Claimant to return to work with no climbing or scaffolding and with minimum bending or stooping. (CX 6 at 32) Physical therapy began on August 21, 1998. (CX 8)

On August 28, 1998 Dr. Barnes discontinued the knee brace, continued the light duty, ordered a left knee bone scan and requested approval from the Employer therefor. (CX 6 at 30-31) On September 3, 1998 Dr. Banes continued the light duty (CX 6 at 29) and on September 16, 1998 Dr. Wiggins released Claimant to return to work at her job as a painter helper. (CX 6 at 28) However, five days later Dr. Barnes returned Claimant to light duty with no crawling, kneeling, squatting, limited walking and no more than one-half mile. He also requested approval for an MRI of the lumbosacral spine. (CX 6 at 27) On October 5, 1998 Dr. Barnes gave Claimant an excuse to justify her absence from work on September 18, 1998 “due to non-ability to do regular work,” and there is also a “request (for a) bone scan” and “request neuro consult” has been crossed out. (CX 6 at 26) On October 19, 1998, Dr. Barnes continued the light duty and he referred Claimant to Dr. Millette for evaluation of “nerve damage (to) left knee,” ordered a bone scan and referred Claimant to Health South for physical therapy. (CX 6 at 25, CX 9)

On November 2, 1998 Dr. Barnes released Claimant to return to work on light duty with no bending, no crawling and no walking over one-half mile. (CX 6 at 24) In an undated report, the nurse continued the restrictions and there is a request for approval of a neuro consult and bone scan. (CX 6 at 23) On November 16, 1998 (CX 17 at 47) Dr. Barnes continued the light duty, decreased the walking restriction to one-quarter of a mile and reported that Claimant was out of work due to the unavailability of light duty. (CX 6 at 22) On December 4, 1998 Dr. Barnes recommended diagnostic arthroscopy of the left knee and a neuro consult for her left wrist and elbow. (CX 6 at 20) As of December 14, 1998 Dr. Barnes continued the light duty and was “waiting approval to do surg(ery).” (CX 6 at 20) On January 18, 1999 Dr. Barnes continued the light duty work status and the restrictions and ordered a functional capacities evaluation (FCE), a test designed to determine her residual work capacity. (CX 6 at 19)

As of December 4, 1998, Dr. Barnes reported that Claimant had been off work for over one month, that she was still “having

difficulty with her left wrist and elbow, also her left knee," and that she had difficulty straightening out her leg and that Claimant's left knee MRI was negative. Dr. Barnes also recommended an arthrogram and had been talking to the Carrier's representative since July "about getting a scope done on Alma Bolton's left knee," but thus far permission had not yet been granted. (CX 17 at 49) As of December 14, 1998 approval was still pending (CX 17 at 51) and Dr. Barnes commented at that time as follows. . . "right now it doesn't appear that we have anything medically to change and her MRI of her knee is negative." (CX 17 at 52)

The FCE was performed on January 25, 1999 and Douglas G. Roll, PT, OCS, OMPT, opined that Claimant gave maximum effort in the FCE, that there was no symptom magnification and that she could do light work with no lifting or carrying over 25 pounds, over 20 pounds occasionally or frequently up to 10 pounds. She could walk or stand frequently and can push/pull with her arms and can use leg controls. (CX 10, EX 9 at 3)

On February 1, 1999, Dr. Wiggins continued the light duty work and made an appointment with Dr. Millette for further evaluation (CX 6 at 18), and that examination took place on March 26, 1999. Dr. Millette, taking a history report which included "some question as to whether or not 'she has RSD'" gave this impression: subjective numbness of the left arm and leg post trauma by history," and he ordered nerve conduction studies of the left upper and left lower extremities. The doctor saw no need for EMG studies at that time and commented as follows: This patient does not seem to have a complex regional pain symptom complex. We will obtain the electrical studies for completeness sake." (CX 16 at 2) Those tests were performed and as of April 5, 1999, Dr. Millette gave this impression: Basically normal nerve conduction study of the right (sic) upper and of the right (sic) lower extremity. (CX 16 at 1)

On April 21, 1999 Dr. Barnes "continue(d) (the) current work restriction" and stated in the comments section: "return after surg. approval." (CX 6 at 17) On August 11, 1999 Dr. Barnes "continue(d) (the) same restrictions," he ordered an MRI of the left knee and requested approval therefor. (CX 6 at 16) Claimant's personnel file contains copies of the letter from Drs. Barnes, Wiggins and Black. In this regard, **see** CX 17.

Several doctors have suspected Claimant's symptoms may be due to RSD since at least August 19, 1998 and her prescription for physical therapy includes a reference to RSD. (CX 17 at 27) As of October 23, 1998, Dr. Black stated that diagnostic tests were needed to "see if there are objective studies that can support her (subjective) complaints," that her left leg symptoms may be due to RSD, "which he (thought is) a high likelihood," that "she would need extended physical therapy and it is not going to reverse in a short period of time" and "that Dr. Laseter who specializes in the

treatment of RSD would be an excellent opinion to kind of settle this issue whether or not he thinks RSD is going on in her knee and he would be the ideal person to take over her care if he does feel that is the case." (CX 17 at 44)

Claimant has not worked for the Employer since October 22, 1998 and the Employer terminated compensation benefits after learning that Claimant was working as a dietary aide at Sunplex Subacute Center. As noted, Claimant's duties included, **inter alia**, setting up food trays and delivering them to the residents of the nursing/rehabilitation home according to their dietary restrictions. She last saw Dr. Barnes on August 11, 1999 because her work as a dietary aide caused her left knee to become swollen. Dr. Barnes still wants to have the MRI and arthroscopic surgery performed and he told her that there was no need for her to return to see the doctor until the Employer authorizes the surgery. She began working as a dietary aide on July 23, 1999 after her supervisor assured Claimant that work was within her restrictions. She left her job selling home security alarms because she was able to earn only about $350.00 for her four months of work and she found that work as a dietary aide through her own efforts. She applied for other work after leaving the Employer but no one will hire her. Claimant's supervisor at the center promised her 32 hours of work each week and she would have to work the night shift (11 PM to 7:30 AM) a few days each week. However, on Thursday, August 5, 1999 Claimant was given her work schedule for the next week and this showed her working the night shift for those days she was scheduled, and her supervisor told her that her hours would be further decreased. Claimant then voluntarily quit that job because those hours conflicted with her parental duties. (TR 77-84) Claimant also worked at Unique Fashions from November 24, 1999 through February 1, 2000, earning $2,033.15 in that job. (EX 27)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a for-the-most part credible but obviously poorly-motivated Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8

BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have

caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that she experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a

medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As neither party disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to Employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate her condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of**

Maryland, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Sir Gean Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to her bodily frame, **i.e.**, her left leg, left wrist and left elbow problems, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos**

v. Avondale Shipyards, Inc., 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively establishes, and I so find and conclude, that Claimant injured her left knee, left elbow and left wrist in a relatively minor shipyard accident on July 14, 1998, that the Employer had notice of the injury on the same day, authorized appropriate medical care and treatment (EX 1) and paid certain compensation benefits, at the weekly rate of $208.94, from October 23, 1998, at which time she stopped working because of her injury and because the light duty work the Employer provided for her post-injury had ended (EX 2), that the Employer terminated such benefits on September 10, 1999 (EX 26) after learning that she was gainfully employed at the Sunplex Subacute Center (EX 19) and that Claimant timely filed for benefits on or about December 1, 1998 (CX 1) once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant’s disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff’d**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work she can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents Claimant from engaging in the only type of gainful employment for which she is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of her disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once Claimant has established that she is unable to return to his former employment because of a work-related injury or occupational

disease, the burden shifts to the Respondents to demonstrate the availability of suitable alternate employment or realistic job opportunities which Claimant is capable of performing and which she could secure if she diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that she has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), she bears the burden of demonstrating her willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that she is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, She is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984). **See also Pool Company v. Director, OWCP (White),** 206 F.3d 543 (5th Cir. 2000).

Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act or (2) receiving compensation benefits under Section 8(c)(21). Since Claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portion of Sections 8(c)(1) - (20), with the awards running consecutively. **Potomac Electric Power Co. v. Director, OWCP**, 449 U.S. 268 (1980). In **Brandt v. Avondale Shipyards, Inc.**, 16 BRBS 120 (1984), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

The parties deposed Dr. Charlton Barnes on October 26, 1999 (CX 20) and the doctor, a specialist in orthopedic surgery, testified that he first saw Claimant on February 25, 1998 as a result of her January 19, 1998 automobile accident, that she had previously been seen for that accident by Dr. John W. Cope, a group associate of Dr. Barnes, and that Claimant had “hit her head on the windshield” of her car, also injuring both knees, the left hurting

more than the right. Claimant's March 4, 1998 MRI of the left "was not conclusive with regard to a ligament tear" and "it didn't really come up with anything specific" and there was no need to "order another MRI." Left knee arthroscopy took place on March 24, 1998 at Singing River Hospital (SRH) and that procedure showed that "(a)ll she had was an adhesive band; otherwise, everything looked normal." Dr. Barnes saw Claimant as needed post-surgery and he prescribed physical therapy to prepare her to return to work. The doctor discharged her on June 16, 1998 and allowed her to return to work with no restrictions and he did not increase her pre-existing left knee impairment. (CX 20 at 3-14)

Dr. Barnes next saw Claimant on August 3, 1998, after her July 14, 1998 shipyard accident, and the doctor's progress reports have been extensively summarized above, but I will note again that her left knee x-rays were negative and that she continued to work on light duty until October 22, 1998. Claimant was referred to Dr. Black for a second opinion on August 19, 1998 and Dr. Black, in the same group with Dr. Barnes, saw Claimant a number of times. On September 3, 1998 Dr. Barnes recommended a work hardening program to prepare her to return to work at her regular job. According to Dr. Barnes, Claimant's August 3, 1998 history report about her July 14, 1998 injury refers only to her left knee problems and she did not complain of left elbow or left wrist problems until September 19, 1998. Left wrist x-rays taken two days later "were normal." (CX 20 at 14-30)

Dr. Barnes further testified that he imposed work restrictions on the Claimant solely because of her subjective complaints, that her December 4, 1998 MRI of the left knee was negative, that arthroscopic surgery on her left knee is both for diagnostic and treatment purposes, that he has recommended such surgery to "(m)ake sure we're not missing anything" and that he agreed with the restrictions imposed because of her January 25, 1999 FCE. EMG studies on her left leg and left arm performed thereafter were also normal and Dr. Barnes gave Claimant those results when he saw her on April 12, 1999. Dr. Barnes saw no change in Claimant's condition between August 3, 1998 and that exam on April 12, 1999. Dr. Barnes last saw Claimant on August 11, 1999 and at his deposition he rated her left leg impairment at five (5%) percent based upon the lack of range of motion. (CX 20 at 31-36).

Claimant was working as a dietary aide at the time of that August 11, 1999 examination and she discussed that job with the doctor who testified, "If she can do it, fine," when he was asked if that job was an appropriate position for her. Dr. Barnes further testified that her left knee arthroscopic surgery is medically necessary to find out what is going on in her knee as she has been consistently complaining of those symptoms since July 14, 1998, and the doctor wants to "find out if anything has changed, and then put an end to it," the doctor remarking that the arthroscopic surgery might possibly reduce her impairment rating,

that an MRI is not one hundred (100%) percent accurate and that he has seen false positives and false negatives in that test. According to the doctor, an "arthrogram would tell you if you had a lateral or medial ligament tear, if it was acute," the doctor again remarking that "arthrograms (are) very bad" because, unlike an MRI where you can visualize the structures, "an arthrogram is just a coating. It's not very good, either." Dr. Barnes estimated that Claimant's recovery from a negative arthroscope would be about three weeks but the recovery from a positive arthroscope would vary and would be dependent upon the degree of damage within the left knee. (CX 20 at 37-42)

Dr. Barnes was shown Dr. Cooper's history report from the Claimant on July 14, 1998 and agreed that Claimant was complaining of left knee, left wrist and left elbow problems at that time. (CX 20 at 45-47) The Carrier's workers' compensation adjuster has denied approval for the left knee arthrogram and arthroscopic surgery and Dr. Barnes reiterated his opinion that such procedures are reasonable and necessary medical treatment to diagnose and treat Claimant's problems. (CX 20 at 49) Dr. Barnes ordered a bone scan "to make sure we weren't missing a crack or something that wouldn't be picked up on the MRI or plain films" but that reasonable and necessary medical procedure has also been denied by the Carrier, the doctor remarking, "I use it as a screening test when I'm not quite sure what's going on to make sure I'm not missing anything" as "it's really a pretty good test." (CX 20 at 51-52)

With reference to Claimant's credibility, Dr. Barnes pointed out that he scoped Claimant's left knee on March 23, 1998 because of her subjective complaints and he further testified as follows (Emphasis added) on page 53 of his deposition (CX 20):

> **Well, I think after scoping her knee the first time and not really coming up with anything that (was) objective, then that would cloud her symptoms that she would give subjectively to me from then on.**

Dr. Barnes ordered a lumbosacral spine x-ray at that September 21, 1998 examination because with some patients a ruptured disc may result in numbness in their legs and toes and feet and that Claimant's July 14, 1998 fall was the type of accident that could have produced her symptoms. The Carrier's adjuster advised Dr. Barnes on September 23, 1998 that "Frank Gates-Halter is not paying any claims related to a back injury, per Donna." Moreover, the bone scan and the neurological consult are also both reasonable and necessary treatment to find out what is going on as a bone scan is "a screening test" and would be used in her case to ascertain whether "she's had an injury to her medial or lateral or both ligaments of her knee or it could be that's the way she's made." The Carrier has denied those recommendations and the doctor is

unable to “evaluate her fully” without those tests he has ordered. Furthermore, as of December 4, 1998 the Carrier would not approve a course of physical therapy and the arthroscopic surgery. He has not been given any reason for the denial of those recommendations and he has “order(ed) these just to make sure (he is) not missing anything” as “it’s not a complete exam without doing them.” Claimant’s restrictions, as of November 16, 1998, would be continued for her light duty work for the Employer. (CX 20 at 54-67)

Dr. Barnes agreed that his group partner, Dr. Arthur Black, as of August 19, 1998, disagreed on the necessity for an arthrogram and, as of August 28, 1998, Dr. Black did not order an MRI, although Dr. Barnes had done so the day before. Dr. Black’s report on that day is also silent on the need for a bone scan. Dr. Barnes also agreed that the Carrier had approved a course of physical therapy based upon the August 21, 1998 report of Robin Walley, the physical therapist, but apparently that course ended and Dr. Barnes recommended another course on November 16, 1998, Dr. Cope, as of March 22, 1995, found “some function overlay.” **i.e.**, a symptom which cannot be “attributed to a physical finding,” thereby agreeing with Dr. Cope as to Claimant’s credibility and possible symptom magnification. (CX 20 at 68-73)

Dr. Barnes disagreed with Dr. Black’s suspicions that Claimant might have RSD, **i.e.**, reflex sympathetic dystrophy, although he did remark, “I would think if he thinks she’s got dystrophy, you’d want to get an arthrogram.” (CX 20 at 73-74)

I have extensively summarized the medical evidence herein to put this claim in proper perspective because of the parties’ positions.

On the basis of the totality of this closed record, I find and conclude that Claimant has established that she now cannot return to work as a painter helper. The burden thus rests upon the Respondents to demonstrate the existence of suitable alternate employment in the area. If the Respondents do not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Respondents did submit probative and persuasive evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff’d on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant had a total disability and that such disability continued until June 23, 1999, at which time she began working at the Sunplex Subacute Center, as further discussed below.

Claimant's injury has become permanent. A permanent disability

is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF**

Exchange Service, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

In this proceeding, Claimant seeks an award of temporary total disability from October 23, 1998 through the present and continuing, as well as temporary partial benefits from July 14, 1998 through October 22, 1998.

With reference to Claimant’s transferrable skills and her residual work capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger’s Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because she does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between Claimant's pre-injury average weekly wage and her post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of

claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980). It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of her injury**. **Richardson**, **supra**; **Cook**, **supra**. In this proceeding, the Claimant has sought, both before the District Director and before this Court, benefits for temporary total and partial disability from October 23, 1998 to date and continuing. Moreover, the issue of permanency has not yet been considered by the Deputy Commissioner. (ALJ EX 2) **In this regard**, **see Seals v. Ingalls Shipbuilding, Division of Litton Systems, Inc.**, 8 BRBS 182 (1978).

With reference to Claimant's residual work capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18

BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980). It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in her usual employment pre-injury and the wages claimant's post-injury job paid at the time of her injury. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of her injury. That is exactly what Section 8(h) provides in its literal language.

Respondents submit that Claimant's post-injury wages are representative of her wage-earning capacity, that she has learned how to live with and cope with her multiple conditions and that her Employers have allowed her to compensate for her limitations. While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternate employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken on this issue many times and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer

is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

In the case at bar the Employer has offered the October 21, 1999 Initial Vocational Evaluation Report of Adrienne M. Kern, MHS, CRC, LRC #568, the Employer's rehabilitation consultant, wherein Ms. Kern reports that she conducted an interview of the Claimant in the presence of her attorney on October 11, 1999 and that she and the Claimant "discussed her current medical status, work history, educational history, financial and social status," as well as "her vocational interests and prospects for returning to work." According to Ms. Kern, claimant had transferrable skills and the intellectual/physical capacities to perform light or sedentary work, and specific jobs would be discussed in a subsequent report. (EX 17)

Ms. Kern's file reflects that Claimant last worked at the Sunplex Subacute Center on August 18, 1999, that she resigned without notice and walked out of her job during the work shift because she was scheduled to work the night shift. (EX 17 at 13)

The parties deposed Ms. Kern on November 22, 1999 (EX 16) and Ms. Kern, who has been a vocational rehabilitation consultant for "about three and a half years" and who has also been qualified in the field of vocational rehabilitation, testified that Claimant's file was referred to her on September 22, 1999 and that she was instructed "to meet with the client to conduct an initial evaluation and to determine appropriate recommendations as far as the case was concerned at that point." Ms. Kern interviewed Claimant on October 11, 1999 and, after reviewing her medical records, the results of the FCE on January 25, 1999 that showed she could work at the light duty level and her work restrictions that "actually were a little more liberal than the standard light duty restrictions," Ms. Kern opined that Claimant had transferrable skills and a residual work capacity to perform work in a number of areas. (EX 16 at 4-10)

Ms. Kern spoke to the human resources person at the Sunplex Subacute Center, Lance Taylor, as well as to Sylvia Phillips, Claimant's immediate supervisor there, and as a result of those conversations, Ms. Kern concluded that the "lifting requirement of 50 pounds throughout the workday is not an essential function, that the employees usually only lift approximately 20 to 25 pounds occasionally," and that a tenth grade education is not an absolute requirement as "they do have individuals that have an educational level lower than tenth grade." According to Ms. Kern, "Ms. Phillips indicated (Claimant) did very well at her job, that she was not even award that (Claimant) had a disability," Ms. Kern remarking that the job duties of a dietary aide, as discussed by Ms. Phillips, are within Claimant's work restrictions and that she left that job solely "because she did not want to work the p.m. shift" but "preferred working the morning shifts"; in any event,

Claimant did not leave the job because of her job performance or because of an inability to perform her duties. She earned $7.50 per hour as a dietary aide from June 23, 1999 through August 18, 1999. (EX 16 at 11-19)

Ms. Kern also conducted a labor market survey within a forty (40) mile radius of Claimant's residence in Pascagoula on November 19, 1999. At the outset I note that I will consider as suitable alternate employment **only those jobs for which there was an opening at that time and for which Ms. Kern has provided the current entry level salary rate. Moreover, I do not view as suitable alternate employment any job where the salary is strictly on a commission basis as such wages are highly speculative,** such as potential work as a commercial seamstress, and these potential jobs are discussed at pages 19 through 28 of EX 16.

In response to intense cross-examination by Claimant's counsel, Ms. Kern testified that she did not conduct the usual vocational testing to determine Claimant's abilities in reading, spelling or mathematics, that she "typically like(s) for (her) clients to go within under 50 miles" of their residence, that work as a seamstress required that the employee perform "all types of alterations," "that on-the-job training would be provided if she didn't know certain types of alterations," that there are different categories of sewing machines operator, that she used the **Occupational Outlook Handbook** and not the **Dictionary of Occupational Titles** to determine the particular job duties of a seamstress, that she confirmed these job duties with the prospective employers, that performing alterations on particular garments requires specific skills, that the amount of measuring required of a seamstress "would be up to the particular place of employment," that some alterations might involve dealing with fractions, that she proceeded on the assumption that Claimant's previous work as a seamstress gave her the necessary experience to perform the work at the prospective employers she has identified and there was considerable discussion at the deposition as to what exactly constitutes an alteration or embroidery. (EX 16 at 29-53)

As rebuttal evidence to EX 16, Claimant has offered her December 16, 1999 Affidavit wherein she states as follows (CX 23):

"I, Alma Bolton, received a copy of the November 19, 1999 letter from the Employer's Rehabilitation Consultant, Adrienne M. Kern. Ms. Kern's letter was about job leads that she had identified. One job was with G&K Services in Richton, Mississippi which is more than 75 miles from my home and from Halter Marine Shipyard.

"The next day after receiving the letter, on November 22, 1999, I went to the other four job locations that Ms. Kern had listed, where she stated seamstress jobs had been identified. I talked to someone at each place and applied for the jobs, though I

do not think I am qualified since I do not know how to do general sewing or alterations, which each place indicated was the main duty of the job. The only experience I have with sewing was from a job I had when I was eighteen years old in a plant that made blue jeans. My job was to sew up the side seam on the inside of the blue jeans. I had to learn how to thread the machine and sew that one seam. I have never owned a sewing machine or used one at home, and have never had a class or any training in performing alterations on any garments which have already been manufactured.

"Lavones Alterations is located in Gulfport, Mississippi. I talked with the owner, who told me that she required a person to have alterations' experience for the job. She said that the pay is a certain percent of the value of the alterations which are actually done each day, and there is not a hourly wage for this job.

"At Unique Fashions and Alterations located in Biloxi, MS, I applied for the job which Ms. Kern stated in her letter was a part time seamstress job. However, Pat told me that there was no job available at that time, and that when she did have work, it was for sewing or alteration jobs that required you to have experience, and the work would be done at borne.

"However, Pat also ran a business in the Singing River Mall in Gautier, MS called Unique Fashion and Fragrance, located at 2800 U.S. Highway 90, Gautier, MS 395533, and she said she needed a sales clerk for the Holiday Season. I started working at Unique Fashion and Fragrance as a sales clerk for Pat on November 24, 1999 at an hourly wage of $5.35 per hour. I am able to sit down between customers and work as many hours as Pat needs me. During the first week, November 24 through November 30,1999, I worked 29 hours and was paid $155.15. During the second week, December 1 through December 7, 1999, I worked 34 hours and was paid $182.00. During the first five days of this week, December 8 through December 12, 1999, I worked 31 hours.

"I also applied for the seamstress job at A-1 Alterations in Gulfport, MS. I was told that I must have experience in alterations. They also paid only by a percent of the alterations that were done.

"Finally, I applied for the job at West End Cleaners which is at Keesler Air Force Base in Biloxi, MS. They said that they did not have an opening for a seamstress. They also said that the job had been open, that it was mostly doing alterations on military clothes, and that they required you to have experience in making alterations and that you would need to be able to measure and do math. They did have an opening for a counter clerk, which I applied for, but was told when I called back that the job had been filled."

As indicated above, the Respondents have offered a Labor

Market Survey (EX 16) in an attempt to show the availability of work for Claimant as a seamstress. I cannot accept the results of that very superficial survey which apparently consisted of the counselor making a number of telephone calls to prospective employers. While the report refers to personal contacts with area employers, I simply cannot conclude, with any degree of certainty, which prospective employers were contacted by telephone and which job sites were personally visited to observe the working conditions to ascertain whether that work is within the doctor's restrictions and whether Claimant can physically do that work, or whether she has the necessary skills to perform that specialized work.

It is well-settled that Respondents must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Respondents must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

The Labor Market Survey and Ms. Kern's (EX 16) cannot be relied upon by this Administrative Law Judge for the more basic reason that there is a complete absence of any information about the specific nature of the duties of a seamstress, and whether such work is within the Claimant's transferrable skills and her intellectual abilities and the doctor's physical restrictions. (EX 16) Thus, this Administrative Law Judge has absolutely no idea as to what are the specific duties of a seamstress, at the firms identified by Ms. Kern.

As already noted, there is no specific wage information in the jobs identified by Ms. Kern. The jobs are paid strictly on a commission basis and an average of what might be earned by this Claimant is simply too speculative and does not satisfy the Respondents' burden of showing suitable alternate employment or realistic job opportunities for Claimant. Moreover, Claimant went to those prospective employers, spoke to the appropriate person in personnel, discussed the alleged available jobs and Claimant was either told there were no openings or that they would get back to her. However, there have been no job offers to the Claimant.

In the case **sub judice**, however, I agree with Respondents that Claimant is, in fact, employable and that she has been gainfully employed for the period of time summarized above, but the

parties are in disagreement as to Claimant's post-injury wage-earning capacity.

Claimant alone believes that she is totally disabled as all doctors are in agreement that Claimant can perform light duty or sedentary work within her job restrictions.

On the basis of the totality of this closed record, I find and conclude that Claimant can work as a dietary aide, that she, in fact, was able to perform that job from June 23, 1999 through August 18, 1999, that employer was satisfied with her job performance and that she left that job **solely** because she preferred the morning shift and because she could not work the evening shift because of her parental duties.

Accordingly, I find and conclude that the Claimant has the residual work capacity to work forty (40) hours per week, five (5) days per week, as a dietary aide, that she earned $7.50 per hour for that work in the summer of 1999, that such job, as of the date of her July 14, 1998 shipyard accident, would pay an hourly rate of $7.00, based upon post-injury inflation, in this regard, **see Richardson v. General Dynamics Corporation,** 23 BRBS 327 (1990), and that Claimant's post-injury wage-earning capacity can reasonably be set at $280.00 (**i.e.,** $7.00 per hour x 40 hours =).

However, as Claimant has established that she is not totally disabled, she is limited to the schedule award, pursuant to Section 8(c)(2) of the Act, and as Dr. Barnes' rating of a five (5%) percent permanent partial disability of the left lower extremity is a reasonable rating, I credit and accept such rating as reasonable and proper.

Accordingly, Claimant is entitled to an award of benefits for such impairment commencing on June 23, 1999. (CX 3 at 1, CX 20 at 36)

As noted above, Claimant is entitled to an award of total disability benefits from October 23, 1998 through June 22, 1999, at which time she began to work at Sunplex Subacute Center, thereby establishing that she had wage-earning capacity and is subject to the so-called **Pepco** doctrine.

In the case at bar, Claimant also seeks an award of temporary partial disability benefits from July 14, 1998 through October 22, 1998, at which time her light duty job at the Employer's shipyard ended and she was placed off work on disability status, Claimant alleging that during that period of time "Claimant received frequent medical treatment and could not work the usual hours due to the injury." However, I note that Claimant does not particularize the amount of her alleged weekly lost wages and this closed record does not establish or corroborate this alleged loss of wage-earning capacity. Accordingly, Claimant is not entitled to

any benefits for that closed period of time.

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during **substantially** the whole of the year immediately preceding his injury. **Mulcare v. E.C. Ernst, Inc.**, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, **i.e.**, whether it is intermittent or permanent, **Eleazar v. General Dynamics Corporation**, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, **O'Connor v. Jeffboat, Inc.**, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. **Lozupone v. Stephano Lozupone and Sons**, 12 BRBS 148, 156 and 157 (1979). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. **Hole v. Miami Shipyards Corp.**, 12 BRBS 38 (1980), **rev'd and remanded on other grounds**, 640 F.2d 769 (5th Cir. 1981). The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. **See O'Connor v. Jeffboat, Inc.**, 8 BRBS 290 (1978). **See also Brien v. Precision Valve/Bayley Marine**, 23 BRBS 207 (1990); **Klubnikin v. Crescent Wharf & Warehouse Co.**, 16 BRBS 183 (1984). Moreover, since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment. **See Waters v. Farmer's Export Co.**, 14 BRBS 102 (1981), **aff'd per curiam**, 710 F.2d 836 (5th Cir. 1983); **Duncan v. Washington Metropolitan Area Transit Authority**, 24 BRBS 133, 136 (1990); **Gilliam v. Addison Crane Co.**, 21 BRBS 91 (1987). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," **Duncan**, **supra**, but 33 weeks is not a substantial part of the previous year. **Lozupone**, **supra**. Claimant worked for the Employer only 24 weeks out of the 52 weeks prior to

her July 14, 1998. Therefore Section 10(a) is inapplicable. The second method for computing average weekly wage, found in Section 10(b), cannot be applied because of the paucity of evidence as to the wages earned by a comparable employee. **Cf. Newpark Shipbuilding & Repair, Inc. v. Roundtree**, 698 F.2d 743 (5th Cir. 1983), **rev'g on other grounds,** 13 BRBS 862 (1981), **rehearing granted en banc**, 706 F.2d 502 (5th Cir. 1983), **petition for review dismissed**, 723 F.2d 399 (5th Cir. 1984), **cert. denied**, 469 U.S. 818, 105 S.Ct. 88 (1984).

Whenever Sections 10(a) and (b) cannot "reasonably and fairly be applied," Section 10(c) is applied. **See National Steel & Shipbuilding Co. v. Bonner**, 600 F.2d 1288 (9th Cir. 1979); **Gilliam v. Addison Crane Company**, 22 BRBS 91, 93 (19987). The use of Section 10(c) is appropriate when Section 10(a) is inapplicable and the evidence is insufficient to apply Section 10(b). **See generally Turney v. Bethlehem Steel Corporation**, 17 BRBS 232, 237 (1985); **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Holmes v. Tampa Ship Repair and Dry Dock Co.**, 8 BRBS 455 (1978); **McDonough v. General Dynamics Corp.**, 8 BRBS 303 (1978). The primary concern when applying Section 10(c) is to determine a sum which "shall reasonably represent the . . . earning capacity of the injured employee." The Federal Courts and the Benefits Review Board have consistently held that Section 10(c) is the proper provision for calculating average weekly wage when the employee received an increase in salary shortly before his injury. **Hastings v. Earth Satellite Corp.**, 628 F.2d 85 (D.C. Cir. 1980), **cert. denied**, 449 U.S. 905 (1980); **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981). Section 10(c) is the appropriate provision where claimant was unable to work in the year prior to the compensable injury due to a non-work-related injury. **Klubnikin v. Crescent Wharf and Warehouse Company**, 16 BRBS 182 (1984). When a claimant rejects work opportunities and for this reason does not realize earnings as high as his earning capacity, the claimant's actual earnings should be used as his average annual earnings. **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Conatser v. Pittsburgh Testing Laboratory**, 9 BRBS 541 (1978). The 52 week divisor of Section 10(d) must be used where earnings' records for a full year are available. **Roundtree**, **supra**, 13 BRBS 862 (1981); **compare Brown v. General Dynamics Corporation**, 7 BRBS 561 (1978). **See also McCullough v. Marathon LeTourneau Company**, 22 BRBS 359, 367 (1989).

In the case **sub judice**, the Employer alleges that Claimant's average weekly wage as of her July 14, 1998 injury is $231.89 and that she has properly been paid weekly benefits of $208.94 from October 22, 1998, her first lost time since her injury. (EX 2) On the other hand, Claimant submits that she did not work substantially the year prior to July 14, 1998 because she was absent from work from May 30, 1997 through October 19, 1997 because of a non-work-related personal condition. She was also out of work from March 24, 1998 through June 16, 1998 because she had to undergo left knee surgery as a result of her January 19, 1998

automobile accident. Accordingly, Claimant submits that her average weekly wage should be determined pursuant to Section 10(c) of the Act and that it is $386.78 based upon her actual wages of $9,282.68, exclusive of $125.00 per week disability pay received from March 23, 1998 through June 28, 1998. (CX 15)

While Claimant submits that she earned $9,282.68 for those 24 weeks prior to her injury, Respondents submit that she actually earned $12,058.28 for those weeks.

Claimant testified that she began working for the Employer in April of 1997 at $7.00 an hour, that she was out of work because of her left knee surgery from March 24, 1998 through June 23, 1998, (or June 29, 1998) and that she received a pay raise to $8.50 several weeks prior to her July 14, 1998 injury.

Thus, as those wages, cited above by Claimant and Respondents, do not reasonably represent her wage-earning capacity on the day of her injury, I shall determine Claimant's average weekly wage by taking her hourly rate of $8.50 times the forty-four (44) mandatory hours that she had to work each week, thereby resulting in an average weekly wage of $374.00, an amount which more reasonably represents her wage-earning as of the day of her injury, as opposed to the methodology used by Claimant and by Respondents in their respective determinations of the average weekly wages.

Accordingly, the benefits awarded herein shall be based upon the average weekly wage of $374.00, pursuant to Section 10(c) of the Act.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22

BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

On the basis of the totality of the record, I find and conclude (1) that Claimant has received proper medical care and treatment for her left knee injury and (2) that her left wrist and left elbow problems have resolved themselves without any residual impairment.

While Claimant seeks a left knee arthrogram/arthroscopy/MRI, as well as a bone scan and x-rays of the lumbar spine, Dr. Barnes has prescribed those tests solely because of Claimant's subjective complaints unsupported by any physical findings. I agree completely with Dr. Black on these diagnostic tests as not being medically indicated in this case. I also base my conclusions on this issue on Claimant's less-than-credible testimony at the hearing,

especially as this closed record reflects numerous inconsistencies, as were particularly pointed out by Respondents' counsel in his effective and intense cross-examination of the Claimant.

Accordingly, as Claimant has recovered from her July 14, 1998 injury, as the doctors have no further treatment to offer her, except those tests mentioned by Dr. Barnes, which tests I have already rejected, Claimant is not entitled to an award of future medical benefits as the Respondents have not denied her any reasonable and necessary medical care and treatment, as the District Director can supervise her medical management, if needed, in this regard, **see McCurley v. Kiewest Co.,** 22 BRBS 115 (1989), and as a claim for medical benefits is never time-barred.

At the hearing Claimant announced that she was seeking payment of certain unidentified unpaid medical expenses. However, Claimant's brief is silent on this issue and her brief, at page two, simply seeks an award "for all reasonable and necessary medical treatment ordered by Dr. Barnes and arbitrarily denied by the Employer/Carrier."

Thus, as Claimant does not identify those alleged "unpaid medical expenses," I am unable to consider and make such award. If there are any such expenses, Claimant may request same by a timely filed **Motion for Reconsideration.** If filed, Respondents shall have fourteen (14) days to file a response thereto.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the

above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Failure to begin compensation payments or to file a notice of controversion within twenty-eight (28) days of knowledge of the injury or the date the employer should have been aware of a potential controversy or dispute renders the employer liable for an assessment equal to ten (10) percent of the overdue compensation. The first installment of compensation to which the Section 14(e) assessment may attach is that installment which becomes due on the fourteenth day after the employer gained knowledge of the injury or the potential dispute. **Universal Terminal and Stevedoring Corp. v. Parker**, 587 F.2d 608 (3d Cir. 1978); **Fairley v. Ingalls Shipbuilding**, 22 BRBS 184 (1989), **aff'd in pert. part** and **rev'd on other grounds sub nom. Ingalls Shipbuilding v. Director**, 898 F.2d 1088 (5th Cir. 1990), **rehearing en banc denied**, 904 F.2d 705 (June 1, 1990) **Krotsis v. General Dynamics Corp.**, 22 BRBS 128 (1989), **aff'd sub nom. Director, OWCP v. General Dynamics Corp.**, 900 F.2d 506, 23 BRBS 40, 51 (2d Cir. 1990); **Rucker v. Lawrence Mangum & Sons, Inc.**, 18 BRBS 76 (1987); **White v. Rock Creek Ginger Ale Co.**, 17 BRBS 75, 78 (1985); **Frisco v. Perini Corp.**, 14 BRBS 798 (1981). Liability for this additional compensation ceases on the date a notice of controversion is filed or on the date of the informal conference, whichever is earlier. **National Steel & Shipbuilding Co. v. U.S. Department of Labor**, 606 F.2d 875 (9th Cir. 1979); **National Steel & Shipbuilding Co. v. Bonner**, 600 F.2d 1288 (9th Cir. 1978); **Spencer v. Baker Agricultural Company**, 16 BRBS 205 (1984); **Reynolds v. Marine Stevedoring Corporation**, 11 BRBS 801 (1980).

The Benefits Review Board has held that an employer's liability under Section 14(e) is not excused because the employer believed that the claim came under a state compensation act. **Jones v. Newport News Shipbuilding and Dry Dock Co.**, 5 BRBS 323 (1977), **aff'd sub nom. Newport News Shipbuilding & Dry Dock Co. v. Graham**, 573 F.2d 167 (4th Cir. 1978), **cert. denied**, 439 U.S. 979 (1978).

The Benefits Review Board has held that "a notice of suspension or termination of payments which gives the reason(s) for such suspension of termination is the functional equivalent of a Notice of Controversion." **Hite v. Dresser-Guiberson Pumping**, 22 BRBS 87, 92 (1989); **White v. Rock Creek Ginger Ale Company**, 17 BRBS 75, 79 (1985); **Rose v. George A. Fuller Company**, 15 BRBS 194, 197 (1982) (Chief Judge Ramsey, concurring).

In the case at bar, the Carrier has filed a notice of controversion, Form LS-207, dated September 15, 1999. (EX 26)

Claimant is entitled to an award of additional compensation, pursuant to the provisions of Section 14(e) for the following reason. Although the Employer has accepted the claim, has provided certain medical care and treatment and has voluntarily paid certain compensation benefits, the Employer has used an incorrect average weekly wage. Claimant is entitled to the mandatory assessment on the difference between her correct average weekly wage of $374.00 and the wage used by the Respondents of $231.89 herein. **National Steel and Shipbuilding v. Bonner**, 600 F.2d 1288 (9th Cir. 1979); **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **McNeil v. Prolerized New England Co.**, 11 BRBS 576 (1979); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979). As the form LS-207 was filed on or about September 15, 1999 (EX 26), the Section 14(e) mandatory assessment terminates on January 13, 1999, the date of the telephone informal conference.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer and Carrier (Respondents). Claimant's attorney has not submitted her fee application. Within thirty (30) days of the receipt of this Decision and Order, she shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Respondents' counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after January 13, 1999, the date of the informal conference. Services performed prior to that date should be submitted to the District Director for his consideration.

Section 3(e) of the Act

Section 3(e) of the LHWCA provides:

> Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act pursuant to any other workers' compensation law or section 20 of the Act of March 4, 1915 (38 Stat. 1185, chapter 153; 46 U.S.C. 688) (relating to recovery for injury to or death of seamen) shall be credited against any liability imposed by this Act.

33 U.S.C. §903(e).

It is now well-established that a claimant can obtain concurrent state and federal awards payable by the same employer for

the same injury, so long as the employer receives a credit to avoid double payment to the claimant. See Topic 50.4.1

Section 3(e) provides a statutory credit for state workers' compensation benefits or Jones Act benefits received by employees. This provision is consistent with prior cases holding employers are entitled to a credit under the Act for payments made pursuant to a state award. **Sun Ship, Inc. v. Pennsylvania**, 447 U.S. 715, 12 BRBS 890 (1980); **Calbeck v. Travelers Ins. Co.**, 370 U.S. 114 (1962). **See Darling v. Mobil Oil Corp**., 864 F.2d 981, 986 (2d Cir. 1989) (state law preempted where it interferes with full execution of federal law); **Le v. Sioux City & New Orleans Terminal Corp.**, 18 BRBS 175 (1986). **Accord Bouchard v. General Dynamics Corp.**, 963 F.2d 541, 543-44 (2d Cir. 1992) (Connecticut law determined to conflict with § 3(e)); **Fontenot v. AWI, Inc.**, 923 F.2d 1127, 1132 n.38 (5th Cir. 1991). **Contra E.P. Paup Co. v. Director, OWCP**, 999 F.2d 1341, 27 BRBS 41, 48 (CRT) (9th Cir. 1993) (the Act does not preempt Washington state law requiring reimbursement of previously paid state benefits upon award of benefits under federal maritime law).

In the case at bar Claimant received disability insurance bneefits of $125.00, as part of the Employer's group insurance plan from March 23, 1998 through June 28, 1998.

Section 14(k) of the 1972 LHWCA was changed to Section 14(j) by the 1984 Amendments. Pub. L. No. 98-426, 98 Stat. 1639, 1649, § 13(b). Section 14(j) of the LHWCA provides:

> (j) If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

33 U.S.C. § 914(j).

The purpose of Section 14(j) is to reimburse an employer for the amount of its **advance** payments, where these payments were too generous, for however long it takes, out of **unpaid** compensation found to be due. **Stevedoring Servs. of American v. Eggert**, 953 F.2d 552, 556, 25 BRBS 92, 97 (CRT) (9th Cir.), **cert. denied**, 112 S.Ct. 3056 (1992); **Tibbetts v. Bath Iron Works Corp.**, 10 BRBS 245, 249 (1979); **Nichols v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 710, 712 (1978) (employer's voluntary payments of temporary total disability credited against award of permanent partial compensation). Section 14(j) does not, however, establish a right of repayment or recoupment for an alleged overpayment of compensation. **Ceres Gulf v. Cooper**, 957 F.2d 1199, 1208, 25 BRBS 125, 132 (CRT) (5th Cir. 1992); **Eggert**, 953 F.2d at 557, 25 BRBS at 97 (CRT); **Vitola v. Navy Resale & Servs. Support Office**, 26 BRBS 88, 97 (1992).

Section 14(j) allows the employer a credit for its prior payments of compensation against any compensation subsequently found

due. **Balzer v. General Dynamics Corp.**, 22 BRBS 447, 451 (1989), **on recon, aff'd**, 23 BRBS 241 (1990); **Mason v. Baltimore Stevedoring Co.**, 22 BRBS 413, 415 (1989); **Mijangos v. Avondale Shipyards**, 19 BRBS 15, 21 (1986), **rev'd on other grounds**, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991). If the employer pays benefits and intends them as advance payments of compensation, the employer is entitled to a credit under Section 14(j). **Mijangos**, 19 BRBS at 21.

As already noted above, the employer is also entitled to a credit for payments made under a state compensation act. **Garcia v. National Steel & Shipbuilding Co.**, 21 BRBS 314, 317 (1988); **Ferch v. Todd Shipyards Corp.**, 8 BRBS 316, 319 (1978); **Adams v. Parr Richmond Terminal Co.**, 2 BRBS 303, 305 (1975). **See also Lustig v. Todd Shipyards Corp.**, 20 BRBS 207, 212 (1988), **aff'd in part, rev'd in part, lustig v. U.S. Dept. of Labor**, 881 F.2d 593, 22 BRBS 159 (CRT) (9th Cir. 1989) (employer entitled to credit for proceeds of state workers' compensation settlement but **not** attorney fees or medical liens paid under state workers' compensation act).

However, it is well-settled that the employer is not entitled to a credit for payments made under a non-occupational insurance plan, as those payments are not considered "compensation" for the purposes of Section 14(j). **Pardee v. Army & Air Force Exch. Serv.**, 13 BRBS 1130, 1137 (1981). Because medical expenses are not "compensation," advance payments of compensation may not be credited against awarded medical expenses. **Aurelio v. Louisiana Stevedores**, 22 BRBS 418.423 (1989), **aff'd mem.**, No. 90-4135 (5th Cir. 1991). Interest is also not "compensation" for Section 14(j) purposes. **Castronova v. General Dynamics Corp.**, 20 BRBS 139, 141 (1987). **See also Sproull v. Stevedoring Servs. of America**, 25 BRBS 100, 112 (1991) (holding that interest is not compensation further goal of fully compensating claimant by not allowing employer an offset for its overpayments of disability compensation against interest awarded by the judge).

Moreover, the employer is not entitled to a credit for payments made by a non-occupational sickness and accident carrier, because the employer is not entitled to receive credit for money it never paid. **Mijangos**, 19 BRBS at 21; **Jacomino v. Sun Shipbuilding & Dry Dock Co.**, 9 BRBS 680, 684 (1979); **Pilkington v. Sun Shipbuilding & Dry Dock Co.**, 9 BRBS 473, 480-481 (1978).

Accordingly, the Employer is not entitled to a credit for the benefits made to Claimant in 1998 by another entity as those payments were not considered by the parties to be advance compensation.

Respondents also seek a credit, on a dollar-to-dollar basis, for the amounts Claimant received from Ingalls Shipbuilding, Inc., in full settlement of her left knee injuries in 1992 and 1994, and in support of entitlement to this credit, Respondents cite **Strachan v. Nash,** 782 F.2d 513 (5th Cir. 1986), the leading case in the Fifth

Circuit dealing with the employee's entitlement to concurrent disability benefits for successive work-related injuries. I disagree with Respondents for the following reasons.

Initially, I note that the last employer is responsible for all of the employee's current disability even though prior injuries have contributed to that disability. In such situations, the Employer may be entitled to a credit for such prior impairment if the doctors, as is customarily done for Section 8(f) purposes, had apportioned Claimant's five (5%) percent permanent partial impairment between her 1992, 1994 and 1998 left knee injuries. As no such apportionment has been offered in this case, I am unable to award the Respondents the credit they seek.

Likewise, Respondents seek a credit or offset for the $15,000.00 Claimant received in settlement of her January 19, 1998 automobile accident, "in which she injured her left knee," an "injury eventually requir(ing) an arthroscopy." Dr. Barnes performed the arthroscopic surgery, saw no arthritic changes in the left knee during that procedure and "on June 16, 1998 (Claimant) was found to be completely asymptomatic without need for an impairment rating by Dr. Barnes." Thus, as the automobile accident did not result in any increased disability, Respondents are also not entitled to a credit or offset for that $15,000.00.

However, Respondents are entitled to a credit for Claimant's post-injury earnings at other employers after she was laid-off by this Employer as her light duty job ended. These earnings are as follows: $350.00 from the sale of home security alarms. $927.07 while working at Sunplex Subacute Center (CX 21) and $2,033.15 while working at Unique Fashions. (EX 27)

The Respondents entitlement to a credit for these earnings shall coincide with and end at that time at which her award for the Section 8(c)(2) schedule award ends as the Respondents are entitled to a credit or offset only against future compensation and there is no right to a refund of any overpayments of compensation.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer and its Carrier ("Respondents" herein) shall pay to the Claimant compensation for her temporary total disability from October 23, 1998 through June 22, 1999, based upon an average weekly wage of $374.00, such compensation to be computed in accordance with Section 8(b) of the Act.

2. The Respondents shall pay to Claimant compensation for her five (5%) percent permanent partial disability of the left leg, based upon her average weekly wage of $374.00, such compensation to be computed in accordance with Section 8(c)(2) of the Act and commencing on June 23, 1999.

3. The Respondents shall receive credit for all amounts of compensation previously paid to the Claimant as a result of her July 14, 1998 injury. The Respondents shall also receive a credit for Claimant's post-injury employment at Sunplex ($929.07), at Unique Fashions ($2,033.15) and from the sale of home security alarms ($350.00).

4. Interest shall be paid by the Respondents on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Respondents shall pay to Claimant additional compensation at the rate of ten (10) percent, pursuant to Section 14(e) of the Act, based upon those installments due between October 23, 1998 and January 13, 1999, and based upon the difference between Claimant's correct average weekly wage, $374.00, and the average weekly wage of $231.89 used by the Respondents.

6. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Respondents' counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on January 13, 1999.

DAVID W. DI NARDI
Administrative Law Judge

Dated: April 24, 2000
Boston, Massachusetts
DWD:dr